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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL ABRAHAM, Defendant and Appellant.	E060887 (Super.Ct.No. RIF1301566) O P I N I O N

APPEAL from the Superior Court of Riverside County. Rafael A. Arreola, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Sheila Quinlan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Miguel Angel Abraham appeals from his conviction of robbery (Pen. Code, § 211—count 1),[1] assault with a deadly weapon (§ 245, subd. (a)(1)—count 2), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)—count 3), and active gang participation (§ 186.22, subd. (a)—count 4). As to counts 1 through 3, the jury found true a gang enhancement (§ 186.22, subd. (b)(1)(A)), and as to counts 2 and 3 the jury found true a hate crime enhancement (§ 422.75, subd. (a)).

On appeal, defendant first contends that his conviction of assault by means of force likely to cause great bodily injury in count 3 must be reversed because the evidence was insufficient to support the jury's verdict on that count.

Second, defendant contends the trial court erred in applying the five-year gang enhancement under section 186.22, subdivision (b)(1)(B) to count 3 rather than imposing a two-, three-, or four-year enhancement under section 186.22, subdivision (b)(1)(A). The People concede the error, and we agree.

Third, defendant contends the trial court erred when it failed to impose and stay execution of sentences on counts 2 and 4 under section 654. The People concede the error, and we agree.

Finally, defendant contends the abstract of judgment (1) incorrectly shows a one-year hate crime enhancement for count 1, although the jury found the enhancement not true; (2) mistakenly lists count 2 as a violent felony; and (3) improperly notes that the

[1] All further statutory references are to the Penal Code unless otherwise indicated.

sentence for count 3 is a full and consecutive term instead of a one-third consecutive term. The People concede, and we agree.

We will therefore affirm the judgment but remand for correction of the sentencing errors and amendment of the abstract of judgment.

II. FACTS AND PROCEDURAL BACKGROUND

A. *The Crimes*

Eugene McGill, who is African-American, and Addison Taylor who is Caucasian, were walking together in Riverside on February 19, 2013, when they saw four or five young men, including defendant. Defendant said either that "no [racial slur] allowed on the East Side" or "no [racial slur] allowed in this neighborhood." When McGill asked what the problem was, another young man responded with a racial slur.

The young men surrounded McGill, appearing angry. Although McGill tried to "talk them down," one or two of them tried to grab McGill's backpack. McGill's arms were full with his skateboard and a puppy, so he could not defend himself. Defendant swung at McGill, but Taylor hit him first. McGill dropped the puppy, and someone went over and tried to "stomp her head in." McGill pushed that person, knocking his head into a pole. Defendant picked up Taylor's skateboard and swung it at Taylor, hitting him on the side. Taylor caught the skateboard and socked defendant in the face. Taylor's glasses were knocked off, and he was hit in the back of the head a few times. Someone ripped off his necklace. Both Taylor and McGill hit defendant at least once; McGill was never hit and did not suffer any injuries.

A mechanic came out of a nearby automobile repair shop and started yelling. Members of the group grabbed Taylor's skateboard, hat, and telephone and McGill's watch, and the group ran away. The police arrived within a minute or two.

The police followed defendant and another young man and detained them. The police found Taylor's hat and skateboard in a flowerbed at a nearby apartment building. McGill, Taylor, and the mechanic made field identifications of defendant and another assailant.

Robert Kwan, a gang expert, testified about the organization of local gangs and the history of the East Side Rivas gang. He stated his opinion that defendant was an active member of that gang and that the crimes were committed for the benefit of and in association with that gang.[2]

B. *Verdicts*

The jury found defendant guilty of robbery (§ 211—count 1), assault with a deadly weapon (§ 245, subd. (a)(1)—count 2), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)—count 3), and active gang participation (§ 186.22, subd. (a)—count 4). As to counts 1 through 3, the jury found true a gang enhancement (§ 186.22, subd. (b)(1)(A)), and as to counts 2 and 3, the jury found true a hate crime enhancement (§ 422.75, subd. (a)). The jury found the hate crime allegation attached to count 1 to be not true.

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[2] Because no issue is raised on appeal concerning the gang allegations, we set forth summarily the evidence concerning those allegations.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. *Sufficiency of Evidence as to Count 3*

Defendant contends that his conviction of assault by means of force likely to cause great bodily injury in count 3 must be reversed because the evidence was insufficient to support the jury's verdict on that count.

1. Standard of Review

When a criminal defendant challenges the sufficiency of the evidence to support his conviction, we review the whole record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value, such that a reasonable jury could have found the defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) We do not reweigh the evidence, reappraise the credibility of witnesses, or resolve factual conflicts; those functions are reserved for the jury. (*Ibid.; People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

2. Analysis

Defendant acknowledges he tried to punch McGill and that his group attacked McGill and grabbed at his backpack and other property. However, defendant argues that because McGill had never been hit and was not injured, the evidence was insufficient to establish his guilt of the offense of assault by means of force likely to cause great bodily injury.

"Great bodily injury, as used in section 245, means significant or substantial injury." (*People v. Brown* (2012) 210 Cal.App.4th 1, 7.) However, neither actual physical contact nor actual injury to the victim is required to establish assault with force likely to produce great bodily injury. (*Ibid.; People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) Rather, the offense may be established by an attempt to commit a violent injury by the use of force likely to produce great bodily injury. (*People v. Aguilar*, *supra*, at p. 1028.) Such an assault may be committed with the hands or fists alone (*ibid.*), and it is not necessary to show actual injury (*id*. at pp. 1037-1038). The court explained: "One may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on . . . force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial." (*Id.* at p. 1028.)

Numerous cases have established that a single blow may be sufficient to cause great bodily injury. In *People v. White* (1961) 195 Cal.App.2d 389, the defendant confronted the victim for purportedly cutting him off when entering a gas station. The victim said he had not meant to do so and apologized, thinking the incident was over. However, when the victim was leaning on the hood of his car, the defendant punched him in the eye. (*Id.* at p. 391.) The court held that the trial court had erred in dismissing the information charging the defendant with assault by means of force likely to produce great bodily injury, when the evidence showed the assault was unprovoked and delivered at a time when the victim was unprepared to defend himself. (*Id.* at p. 392.) See also *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1093 [single punch to the side of the head resulted

in great bodily injury]; *In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1161-1162 [a single punch delivered without warning and with great force was sufficient to cause great bodily injury]; see also *People v. Cravens* (2012) 53 Cal.4th 500, 508-509 [the defendant was guilty of murder caused by a single blow to the victim's head that knocked him to the pavement, fracturing his skull].)

Defendant relies on *People v. Duke* (1985) 174 Cal.App.3d 296, in which the court held that the defendant had not used force likely to cause great bodily injury. The defendant in that case had grabbed a woman around the neck so as to hold her while he touched her breasts. The force used was so minimal that the victim was able to quickly and easily free herself from his grasp and to run away. (*Id.* at pp. 301-303.) We find *Duke* distinguishable. In that case, the evidence showed that the defendant, who was over six feet five inches tall, *deliberately* did not use force likely to cause great bodily injury. (*Id.* at pp. 301, 303.) Moreover, even in *Duke*, the court observed: "[I]f hands, fists or feet, etc., are the means employed, the charge will normally be assault with force likely to produce great bodily injury." (*Id.* at pp. 302-303.)

The jury determines whether a fist would be likely to produce great bodily injury based on the force, the manner in which it was used, and the circumstances under which the force was applied. (*People v. Score* (1941) 48 Cal.App.2d 495, 498.) And "since the statute focuses on force *likely* to produce harm, it is immaterial that the force actually resulted in no harm whatever." (*People v. Wingo* (1975) 14 Cal.3d 169, 176.) The evidence here showed that defendant started to swing at McGill when he was

incapacitated from defending himself, both because his arms were full and because he was grappling with other assailants who had grabbed his backpack from the rear. The jury could reasonably conclude that the involvement of the multiple assailants who converged on McGill created the likelihood of great bodily injury. We thus conclude substantial evidence supported the jury's resolution of that question. In fact, we note that in argument to the jury, defense counsel conceded defendant's guilt of "[a]ssault with force likely."

B. *Gang Enhancement*

Defendant contends the trial court erred in applying a five-year gang enhancement under section 186.22, subdivision (b)(1)(B) to count 3 rather than imposing a two-, three- or four-year enhancement under section 186.22, subdivision (b)(1)(A). The People concede the error, and we agree.

A felony, which is neither serious nor violent, committed for the benefit of a street gang is enhanced with a sentence of two, three, or four years. (§ 186.22, subd. (b)(1)(A).) A serious felony for purposes of the gang enhancement is defined in section 1192.7, subdivision (c), and that subdivision does not include assault with force likely to cause great bodily injury. Thus, the trial court erred in imposing a gang enhancement under section 186.22, subdivision (b)(1)(B) instead of subdivision (b)(1)(A). We will remand to the trial court for a discretionary sentencing choice.

C. *Hate Crime Enhancement*

In sentencing on the hate crime enhancement as to count 3, the trial court stated: "[T]hat's a consecutive term that I must add one-third the mid term, which is another eight months." The People point out that the trial court erred if it thought it had no discretion as to that enhancement, and on remand, the trial court should specify its chosen term and impose one-third that term. We will direct the trial court to do so on remand.

D. *Section 654*

Defendant contends the trial court erred when it failed to impose and stay execution of the sentences on counts 2 and 4 under section 654. At sentencing, the trial court stated it would stay the sentences as to counts 2 and 4, but the trial court never orally pronounced a term from the sentencing triads for those two counts before staying the sentences. Nonetheless, the minute order for the sentencing hearing indicates the trial court imposed an eight-month term and a 10-year gang enhancement for count 2 and imposed an eight-month term for count 4, but stayed both under section 654.

The correct procedure under section 654 is to impose a sentence on each count and then stay execution of that sentence. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327.) The People concede the error, and we agree. The pronouncement of judgment and sentence must be done orally in court in the defendant's presence. (*People v. Wilshire Ins. Co.* (1977) 67 Cal.App.3d 521, 532.) Under the circumstances, when the minute order differs from the trial court's oral pronouncement as to judgment and sentence, the oral pronouncement takes precedence over the minute order. (*Ibid.*) We

will therefore remand for the trial court to impose and then stay execution of the sentences for counts 2 and 4.

E. *Errors in Abstract of Judgment*

Defendant contends that the abstract of judgment (1) incorrectly shows a hate crime enhancement for count 1, (2) mistakenly lists count 2 as a violent felony, and (3) improperly notes that the sentence for count 3 is a full and consecutive term instead of a one-third consecutive term. The People concede the error, and we agree.

1. Hate Crime Enhancement

As noted, the jury found the hate crime enhancement as to count 1 not true; however, the abstract of judgment and the sentencing hearing minute order erroneously show that the trial court imposed an eight-month term for that enhancement. We will direct the trial court to correct the minute order and abstract of judgment accordingly.

2. Count 2

On the abstract of judgment, a box is checked indicating that count 2, a violation of section 245, subdivision (a)(1), assault with a deadly weapon, is a violent felony. The People concede, and we agree, that the crime is neither a violent nor a serious felony. We will direct the trial court to correct the abstract of judgment accordingly.

3. Count 3

The abstract of judgment incorrectly indicates that the term for count 3 is a full consecutive term. At the sentencing hearing, the trial court orally pronounced that the term selected for count 3 was one-third the middle term. The People concede, and we

agree, that the abstract of judgment is in error in that regard. We will direct the trial court to correct the abstract of judgment accordingly.

IV. DISPOSITION

The judgment of conviction is affirmed, and the matter is remanded to the trial court for resentencing as to counts 2 and 4, resentencing on the gang enhancement and hate crime enhancement as to count 3, and amendment of the abstract of judgment to indicate that (1) no hate crime enhancement was imposed as to count 1, (2) count 2 is not a serious felony, and (3) the sentence for count 3 was not a full consecutive term. The amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation.

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KING
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.